Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 80-45

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

EUGENE JOHNSON, III,
Petitioner,

v.

J.O.L., II,
Respondent.

ON A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENT'S REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS THE WRIT OF CERTIORARI

HAL WITT
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 828-8240
Counsel for Respondent

November 13, 1980

Washington, D.C. • THIEL PRESS • (202) 638-4521

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Respondent will not reply to the shrill rhetoric in petitioner's opposition, but will confine himself to commenting on the arguments raised or suggested by petitioner.

1. Petitioner suggests that this case is not moot despite respondent's desire to have the adoption decree vacated. He suggests that this is a case of "mere voluntary cessation of allegedly illegal conduct" in the line of *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), and *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968). That is not true because here there is

no allegation of illegal conduct by respondent. Rather, this is a case where respondent has expressed a willingness to abandon a claim made pursuant to existing statutory procedures. Although petitioner attacks the constitutionality of the statute under which respondent's claim was pursued, that challenge no longer affects either party to this case because respondent is willing to abandon his claim. Respondent is not a public official responsible for future enforcement or application of the challenged statute. He has no further interest in defending its validity. Despite the litany of abstract hypotheticals posed by petitioner in his opposition, the statute's provisions would not affect the interests of either party to this case if the writ is dismissed.

2. This is not a case "capable of repetition, yet evading review" in the line of *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911), as suggested by petitioner. This Court has defined the contours of that doctrine and ruled that its application is appropriate only where two conditions are satisfied, that is, where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). *See also Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Sosna v. Iowa*, 419 U.S. 393 (1975). Because the adoption procedures complained of in this case are not by nature short-lived and have been fully litigated, the first condition is not met. Because there is no reasonable expectation that petitioner will be subjected to the same challenged procedure again in the future, the second condition is also unmet. Consequently, this case does not

satisfy the conditions permitting application of the "capable of repetition, yet evading review" doctrine, and the doctrine presents no bar to the dismissal of the writ. In addition, in order to provide further and complete assurance that the complaining party will not be subjected to the same action again, respondent will stipulate in the trial court that he will not again seek adoption under the challenged statutory provision.

3. Petitioner's opposition suggests that there were "other issues" raised in the trial court by his answer there. Those issues are not before this Court in any event, and their existence is additional reason for a remand to the trial court, not a basis for keeping the case here.

4. Any public interest in litigating the validity of the District of Columbia statute in this case is absent in light of respondent's lack of interest in the outcome of this case. The statute may be changed before it is applied again. As noted above, its application to petitioner would not be sought by respondent again.

The statutory challenge raised by petitioner in this case no longer affects either party. No case or controversy is before this Court. The writ of certiorari should be dismissed and the case remanded so that the adoption decree can be vacated by the trial court.

Respectfully submitted,

HAL WITT

1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 828-8240

Counsel for Respondent

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